SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 8 #2

COMMERCIAL INVESTMENT TRUST CORPORATION, COMMERCIAL INVESTMENT TRUST, INC., UNIVERSAL CREDIT CORPORATION, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF INDIANA

STATEMENT AS TO JURISDICTION

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Civil Action No. 8

UNITED STATES OF AMERICA,
Complainant,

vs.

FORD MOTOR COMPANY, COMMERCIAL INVESTMENT TRUST CORPORATION, COMMERCIAL INVESTMENT TRUST, INC., UNIVERSAL CREDIT CORPORATION, UNIVERSAL CREDIT COMPANY OF DELAWARE, UNIVERSAL CREDIT COMPANY OF INDIANA, AND UNIVERSAL CREDIT COMPANY, INC.,
Respondents

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, Commercial Investment Trust Corporation, Commercial Investment Trust, Inc., Universal Credit Corporation, Universal Credit Company of Delaware, Universal Credit Company of Indiana, and Universal Credit Company, Inc. (hereinafter referred to as the appellants or the "Respondent Finance Companies"), submit herewith their statement showing the basis of the

jurisdiction of the Supreme Court to entertain an appeal in this case.

The basic question involves the authority of the trial court to refuse to modify an antitrust consent decree in accordance with the express provisions of the decree.

A. Jurisdiction Statute

The statutory provisions that confer jurisdiction upon this court to review the decree of the District Court upon direct appeal are Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, as amended, 15 U. S. C. Sec. 29, and Section 238 of the Judicial Code, as amended, 28 U. S. C. Sec. 345. The direct appeal provided by these statutes is the sole mode of review available to appellants. The following cases sustain the jurisdiction of the Supreme Court:

Swift & Co. v. *United States,* 276 U. S. 311, 323;
United States v. *California Co-op. Canneries,* 279 U. S. 553, 558;
United States v. *Swift & Co.,* 286 U. S. 106, 109;
Ethyl Gasoline Corp. v. *United States,* 309 U. S. 436, 446;
Chrysler Corp v. *United States,* 316 U. S. 556, 562.

B. Dates of Decree and Petition for Appeal

The date of the final decree of the District Court here sought to be reviewed is July 25, 1946. The court below delivered no written opinion or discussion of the case, but did make certain findings of fact and conclusions of law in connection with the entry of the decree in question. A copy of these findings and conclusions, together with the final decree herein, is reproduced as Appendix A, and attached to this jurisdictional statement.*

* (Clerk's Note. The Findings, Conclusions and decree appear as in Appendix to the Statement as to Jurisdiction in No. 643 and are not reprinted here.)

The date upon which application for appeal to this Court was presented to District Judge Patrick T. Stone was September 16, 1946.

C. Statement

This is an appeal from a final decree of the District Court of the United States for the Northern District of Indiana, South Bend Division, which, among other things, denied appellants' motion to suspend and modify certain portions of an earlier final decree, dated November 15, 1938, which had been entered in the same court with the consent of the parties in a suit in equity brought by the United States under Section 4 of the Sherman Antitrust Act of July 2, 1890, c. 647, 26 Stat. 209, as amended, 15 U. S. C. Sec. 4.

Paragraph 6(i) of the consent decree of November 15, 1938, restrains Ford Motor Company (hereinafter referred to as the "Manufacturer") from arranging or agreeing with appellants that an agent of the appellants and an agent of the Manufacturer shall together be present with any dealer for the purpose of influencing the dealer to patronize appellants. Paragraph 6(k) of such consent decree restrains the Manufacturer from recommending, endorsing or advertising the appellants to any dealer or to the public. Paragraph 12a of the consent decree provides that the restraints and requirements contained in Paragraphs 6(i) and 6(k) would be suspended until such time as they should be imposed, in substantially identical terms, upon General Motors Corporation and its subsidiaries in the event that the Trial Court, in its instructions to the jury in the criminal proceedings then pending against General Motors Corporation and others, should hold that these acts did not constitute a proper basis for the return of a general verdict of guilty.

Paragraph 7(d) of such consent decree restrains the appellants from arranging or agreeing with the Manufac-

turer that an agent of the Manufacturer and an agent of the appellants shall together be present with any dealer for the purpose of influencing the dealer to patronize appellants. Paragraph 12a of the consent decree provides that the restraints and requirements contained in Paragraph 7(d) would be suspended until they should be imposed, in substantially identical terms, upon General Motors Acceptance Corporation and its subsidiaries in the event that the Trial Court, in its instructions to the jury in the criminal proceedings then pending against General Motors Corporation and others, including General Motors Acceptance Corporation, should hold that these acts did not constitute a proper basis for the return of a general verdict of guilty against General Motors Acceptance Corporation.

The pertinent facts may be briefly stated: *Original proceedings:* On November 7, 1938, in the United States Court for the Northern District of Indiana, South Bend Division, the United States filed its complaint in equity against the Manufacturer, and against Commercial Investment Trust Corporation and certain of its subsidiaries, appellants herein. The bill, under Section 1 of the Sherman Act, alleged that the Manufacturer, together with the Respondent Finance Companies, had conspired to exclude all other finance companies from financing the sale of Ford automobiles. The bill prayed, among other things, that the Manufacturer be restrained from "agreeing with any finance company that an agent of the finance company and the Manufacturer will be present for the purpose of influencing the dealer to patronize any particular finance company;" and from "recommending or advertising any particular finance company to any dealer or to the public."

On November 15, 1938, a consent decree was entered as the final decree of the court, in which, among other things, the restraints specified hereinabove were granted with

respect to the Manufacturer and Respondent Finance Companies.

Paragraph 12a of the consent decree, after referring to a proceeding, then pending in the Court in which the decree was entered, against General Motors Corporation instituted by the filing of an indictment by the Grand Jury on May 27, 1938, No. 1039, provided in part as follows:

> " (2) A general verdict of guilty returned against General Motors Corporation in said proceeding, followed by the entry of judgment thereon, shall be deemed to be a determination of the illegality of any agreement, act or practice of General Motors Corporation which is held by the trial court, in its instructions to the jury, to constitute a proper basis for the return of a general verdict of guilty. A special verdict of guilty returned against General Motors Corporation in said proceeding, followed by the entry of judgment thereon, shall be deemed to constitute a determination of the illegality of any agreement, act or practice of General Motors Corporation which is the subject of such special verdict of guilty. A plea of guilty or nolo contendere by General Motors Corporation, followed by the entry of judgment of conviction thereon, shall be deemed to be a determination of the illegality of any agreement, act or practice which is the subject matter of such plea. The determination, in the manner provided in this clause, of the illegality of any agreement, act or practice of General Motors Corporation shall (for the purpose of clause (3) of this paragraph) be considered as the equivalent of a decree restraining the performance by General Motors Corporation of such agreement, act or practice, unless or until such judgment is reversed, or unless such determination is based, in whole or in part, (a) upon the ownership by General Motors Corporation of General Motors Acceptance Corporation, or (b) upon the performance by General Motors Corporation of such agreement, act or practice in combination with some other agreement, act or practice with which the respondents are not

charged in the indictment heretofore filed against them by the Grand Jury on May 27, 1938, No. 1041;

"(3) After the entry of a consent decree against General Motors Corporation, or after the entry of a litigated decree, not subject to further review, against General Motors Corporation by a court of the United States of competent jurisdiction, or after the entry of a judgment of conviction against General Motors Corporation in the proceeding hereinbefore referred to, or after January 1, 1940 (whichever date is earliest), the court upon application of any respondent from time to time will enter orders:

(i) suspending each of the restraints and requirements contained in subparagraphs (d) to (f) and (h) to (l), inclusive, of Paragraph 6 of this decree to the extent that it is not then imposed, and until it shall be imposed, in substantially identical terms, upon General Motors Corporation and its subsidiaries, and suspending each of the restraints and requirements contained in subparagraphs (a), (c) and (d) of Paragraph 7 of this decree to the extent that it is not imposed and until it shall be imposed in substantially identical terms, upon General Motors Acceptance Corporation and its subsidiaries, either (w) by consent decree, or (x) by final decree of a court of competent jurisdiction not subject to further review, or (y) by decree of such court which, although subject to further review, continues effective, or (z) by the equivalent of such a decree as defined in clause (2) of this paragraph; provided, however, that if the provisions of a consent or litigated decree against General Motors Corporation and its subsidiaries corresponding to subparagraphs (j) and (k) of Paragraph 6 of this decree are different from said subparagraphs of this decree, then upon application of the respondents any provision or provisions of said subparagraphs will be modified so as to conform to the corresponding provisions of such General Motors Corporation decree;

(ii) suspending each of the restraints and requirements contained in the remaining subparagraphs (a), (b), (c) and (g) of Paragraph 6 to the extent that it is not then imposed, and until it shall be imposed, upon General Motors Corporation and its subsidiaries in any manner specified in the foregoing sub-clause (i) of clause (3), if any respondent shall show to the satisfaction of the court that General Motors Corporation or its subsidiaries is performing any agreement, act or practice prohibited to the Manufacturer by said remaining subparagraphs, and suspending each of the restraints and requirements contained in subparagraph (b) of Paragraph 7 of this decree to the extent that it is not imposed, and until it shall be imposed, upon General Motors Acceptance Corporation and its subsidiaries in any said manner, if any respondent shall show to the satisfaction of the court that General Motors Acceptance Corporation is performing any agreement, act or practice prohibited to Respondent Finance Company by said subparagraph (b) of Paragraph 7;

(iii) suspending the restraints of subparagraph (d) of Paragraph 7 of this decree as to Respondent Finance Companies, in the event that the restraints of subparagraph (i) of Paragraph 6 of this decree are suspended as to the Manufacturer.

"(4) The right of the respondents or any of them to make any application for suspension of any provisions of this decree in accordance with the provisions of this paragraph and to obtain such relief is hereby expressly granted."

Proceedings against General Motors—The United States had originally obtained three indictments—one against Ford Motor Company and appellants herein with which it had been dealing, one against Chrysler Corporation and certain finance companies with which it had been dealing, and one against General Motors Corporation and its wholly owned

finance company, General Motors Acceptance Corporation. Each indictment also included different individual defendants. Appellants herein consented to a decree on November 15, 1938, and Chrysler Corporation also consented to a similar decree, but General Motors declined. Accordingly, the Government quashed the indictments against Ford and Chrysler, and the conditions set forth in Paragraph 12a of the Ford consent decree were designed to protect the appellants against prolonged disadvantage in competition with the non-consenting General Motors Corporation and General Motors Acceptance Corporation.

Subsequently in the criminal proceeding against General Motors on the indictment mentioned above the jury returned verdicts of guilty against General Motors Corporation and General Motors Acceptance Corporation; the court imposed sentence on November 17, 1939. On appeal to the United States Circuit Court of Appeals for the Seventh Circuit, these convictions were affirmed. The Supreme Court denied petition for certiorari October 13, 1942, 314 U. S. 618, and denied petition for rehearing November 10, 1942, 314 U. S. 710.

The instructions of the trial court to the jury and their interpretation by the Circuit Court of Appeals for the Seventh Circuit in the case of *United States* v. *General Motors Corporation*, 121 F. (2d) 376, show clearly that the trial court in its instructions held that the only agreements, acts or practices of General Motors Corporation and General Motors Acceptance Corporation which constitute a proper basis for a general verdict of guilty were those which coerced General Motors dealers and retail purchasers to finance their cars with a company with which they would not have financed them had they been free of such coercion. With respect to the matters enjoined in Paragraphs 6(i) 6(k) and 7(d), the trial court held in its instructions to

the jury in the General Motors case that such acts were proper. The trial court instructed (at page 5985):

"• • • it is not charged here that to recommend the use of GMAC there is anything wrong;"

and again (at pages 5987-5988):

"You know you have heard of the terms: exposition; persuasion; argument; coercion.

"They are different steps. They are graduated steps that I suppose every salesman goes through, except perhaps the last.

"In exposition one may expound the merits of that which he has to sell; he may explain its nature and by his exposition make a clear picture of what he has.

"By persuasion he may endeavor to persuade the person to whom he is talking to accept that which he has to offer.

"There is little advancement in his further progress, to argue.

"Persuasion means something softer than argument, perhaps, but he may argue with him and argue with him the respective merits of his product and other products being offered to the person to whom he makes his offer.

"All of these are proper. He may not go beyond that and use something that is within his power to use as a club to coerce the person to accept that which he has to offer."

and again (at pages 6013-6014):

"I think I said to you yesterday that the defendants may expound the alleged advantages of General Motors Acceptance Corporation; they may explain fully the characteristics of its operations, as they claim they exist; they may point out the advantages; they may expound all of those things; they may persuade; they may use persuasion in their conversations, in their

communications with their dealers; they may even argue. Those things are all proper. They have a right, as I have said, to determine to whom they shall sell their automobiles and to whom they shall not. Those things constitute no violation of the law.

"* * * and the charge in this indictment is, that this coercion, this misuse that has proceeded, according to the indictment beyond exposition, persuasion and argument, has resulted in a situation where the commerce in General Motors Corporation, the products of General Motors, from state to state, has been unreasonably restricted and restrained."

In this connection, the opinion of the Circuit Court of Appeals stated (at page 385):

"The Court pointed out that the defendants had the right to select any dealers they saw fit, determine upon what terms to sell General Motors cars, expound the advantages of GMAC and persuade dealers to use GMAC. But the Court added that they could not utilize existing and prospective contracts with dealers as "clubs or instruments" of coercion to compel acceptance of GMAC."

On October 4, 1940, the United States filed its bill in equity in the District Court of the United States for the Northern District of Illinois, Eastern Division, against General Motors Corporation and General Motors Acceptance Corporation. This case has not yet come to trial.

Present pleadings—On May 4, 1946, the Respondent Finance Companies filed their motion pursuant to subparagraphs (2) and (3) of Paragraph 12a of the consent decree to suspend Paragraphs 6(i) and 6(k) until the restraints and requirements contained in such paragraphs shall be imposed in substantially identical terms upon General Motors Corporation and its subsidiaries, and to

suspend Paragraph 7(d) until the restraints and requirements contained in such paragraph shall be imposed in substantially identical terms upon General Motors Acceptance Corporation and its subsidiaries, either by consent decree, or by final decree of a court of competent jurisdiction not subject to further review, or by decree of such court which, although subject to further review continued effective; and to modify Paragraph 6(a), during the suspension of Paragraphs 6(i), 6(k) and 7(d), to the extent that such Paragraph 6(e) would enjoin any of the acts prohibited by Paragraphs 6(i) and 6(k).

Attached to the Respondents' motion were a copy of the instructions of the trial court to the jury in the *General Motors* criminal case and the affidavit of the Vice President and General Counsel for Respondent Finance Companies stating that he was familiar with the facts therein set forth and the circumstances upon which the aforesaid motion was filed, and that the statements therein set forth were true to his own knowledge.

Action of the court below—This motion with a motion by the plaintiff and a motion by Ford Motor Company was heard at a session of the District Court of the United States for the Northern District of Indiana, South Bend Division, on June 10, 1946. After hearing argument of both parties, during which no evidence was submitted by either side, the court, on July 25, 1946, made its "Findings of Fact, Conclusions of Law, and Order," denying the appellants' motion and directing the changing of the date in the second paragraph of Paragraph 12 of the consent decree to "January 1, 1947," as requested by the Government. There was no opinion.

It thus appears that nearly eight years after the entry of a final consent decree and contrary to the express provi-

sion of that decree, the Respondent Finance Companies have been denied the right expressly conceded and granted by the Government in Paragraph 12a of the decree to obtain the suspension of certain restraints, therein referred to. The Government has not obtained a similar decree against General Motors Corporation and its subsidiaries, or General Motors Acceptance Corporation and its subsidiaries, although nearly six years have elapsed since the filing by the Government of the equity suit against General Motors Corporation and General Motors Acceptance Corporation. Thus, General Motors Acceptance Corporation is not now subject to the same restraints imposed upon the Respondent Finance Companies by the terms of the consent decree of November 15, 1938.

D. Substantial Nature of the Question Presented

It was and is an express condition of the consent decree that the appellants would be entitled to a suspension of certain restraints and requirements imposed upon Respondent Finance Companies unless the trial court in the *General Motors* criminal case held that the agreements, acts and practices enjoined in the consent decree constituted a proper basis for the return of a general verdict of guilty. This condition represented a substantial benefit to the appellants and the consent decree would not have been signed by them had it not been inserted. Upon the fulfillment of this condition in the appellants' favor, the right to suspension should not be denied. A consent decree is an agreement as binding on the Government as it is on the defendant.

United States v. *International Harvester Co.*, 274 U. S. 693;

United States v. *Radio Corporation of America*, 46 F. Supp. 654, appeal dismissed, 318 U. S. 796.

To interpret the decree without giving effect to this condition would flagrantly distort the language of a carefully framed decree and seriously reflect on the reliability of the representations of the Government. Otherwise, no litigant would feel confident in entering into any future consent decree with the Government which had conditions beneficial to the defendant.

In the instructions to the jury in the *General Motors* criminal case the only agreements, acts or practices which were held to constitute a proper basis for the return of a general verdict of guilty were those which coerced dealers to finance their cars with a particular finance company. To "recommend," to "persuade," to "argue," were held to be perfectly proper and legal. The failure of the lower court to so find constitutes a serious deprivation of a substantial right belonging to the appellants.

No consent decree or other decree of a court of competent jurisdiction has ever imposed upon General Motors Corporation or its subsidiaries, or upon General Motors Acceptance Corporation or its subsidiaries, either in substantially identical terms or otherwise, any of the restraints and requirements with which the appellants herein have been burdened. Since September, 1945 particularly, these restraints and requirements have placed the appellants at a competitive disadvantage with General Motors Acceptance Corporation and with other new competitors in the field of automobile financing. This is evident from the past statements of representatives of the Government to the appellants, the Court and the public, and it is proved by the uncontradicted assertions of the appellants in their petition under oath, before the District Court. The court below neither found that such evidence must be shown to obtain the relief sought, nor ruled on the sufficiency of the proof

offered by the petition. No contradicting proof, by affidavit or otherwise, was offered by the Government. These changed circumstances clearly entitle the appellants to a suspension of the provisions of the consent decree until the restraints contained therein shall be imposed in substantially identical terms upon General Motors Corporation and its subsidiaries.

United States v. *International Harvester Co.*, 274 U. S. 693;

Coca-Cola Co. v. *Standard Bottling Co.*, 138 F. (2d) 788;

See: *Chrysler Corp.* v. *United States*, 316 U. S. 556, 564; *United States* v. *Swift & Co.*, 286 U. S. 106, 119.

Indeed, the public statements of representatives of the Government reveal that the purpose of the provision which contains the right of suspension was to relieve the appellants of this anticipated competitive disadvantage.

The decision in the *Chrysler* case, *supra*, is not controlling. Although the Chrysler consent decree and the Ford consent decree were similar, the issue before the Supreme Court in the *Chrysler* case was different from that involved here on the appeal of appellants herein. In the *Chrysler* case the Government sought to extend for a year the provision with regard to affiliation. The Government contended that it should be entitled to continue the injunction against Chrysler Corporation's obtaining an affiliate until there is a decision in the *General Motors* civil suit on the issue of divorcement. A majority of four Justices of the Supreme Court upheld the decision of the lower court extending the period of the ban against affiliation. Two Justices dissented. It was pointed out in the majority opinion as one of

the reasons for the decision that, because automobiles and trucks were not being manufactured during the war, Chrysler could not show any economic disadvantage if the affiliation-injunction continued.

In the present case appellants are invoking the terms of the decree itself. The appellants rely upon a binding agreement made by the Government that certain provisions of the consent decree would be suspended if the Government failed to obtain similar injunctive relief against General Motors in the civil suit or if the Government failed to obtain instructions by the trial court in the *General Motors* criminal case that the acts restrained constituted a proper basis for the return of a general verdict of guilty. Appellants contend that the trial court, in the *General Motors* criminal case, did not give such instructions but, on the contrary, as appellants specifically pointed out in the court below, the trial court, in the criminal case, gave instructions that the acts and practices enjoined by paragraphs 6(i), 6(k) and 7(d) of the decree were perfectly proper and lawful.

Furthermore, as the appellants showed in their petition to the court below, since the termination of hostilities in August, 1945, automobiles and trucks have been manufactured by Ford and the financing of automobiles has been revived under changed economic and competitive conditions; factors which did not exist in the *Chrysler* case.

These questions are substantial and highly debatable, and leave to speculation the authority of the United States to propose conditions beneficial to defendants in the making of consent decree.

E. Conclusion

It is thus plain that this appeal is within the exclusive jurisdiction of this Court and involves the review of substantial errors below.

Respectfully submitted,

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